IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-233

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS, et al.,
Petitioners

v.

HELEN B. FEENEY, *Respondent*

BRIEF OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION

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THE INTERESTS OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 24,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of individuals such as veterans whose special problems deserve exceptional attention and protection by states and the Federal Government.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. Neither party is focusing upon the constitutionality of Veterans' Preference Acts generally, WLF's sole concern in this case is to protect the present rights veterans possess in civil service employment.

There is more at stake in this case than the status of a Veterans Preference Statute in Massachusetts. Current and future employment prospects of countless thousands of veterans, both men and women, black and white alike across the United States may be adversely affected by the outcome of this case. WLF seeks to preserve the special status of veterans, a status a grateful nation has bestowed as a recognition of the heroic sacrifices made by members of the United States armed forces in protecting this nation.

ARGUMENT

I. EQUAL PROTECTION CHALLENGES BY WOMEN TOWARDS VETERANS' PREFERENCE ACTS SHOULD BE JUDGED BY A RATIONAL BASIS STANDARD

United States Supreme Court opinions in the twentieth century have articulated two major standards concerning use of the Equal Protection clause of the Fourteenth Amendment to overturn state laws.

The more traditional standard involves determining whether a law which allegedly violates the Equal Protection clause has some saving rational basis to it. This basis is linked to a legitimate public objective. The objective may not even have been the primary purpose behind the enactment of the challenged law.

As Chief Justice Warren observed:

> "[T]he Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.
>
> *McGowan* v. *Maryland,* 366 U.S. 420, 425-26 (1961)

Under the rational basis standard, states have much discretion in fashioning classifications. A legislature may enact reforms gradually, *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955). Nor must classifications have an equal impact upon affected individuals. In this regard, the Supreme Court, over sixty-five years ago declared:

> A classification having some rational basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality . . . [I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911)

More recent restatements were expressed in *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968) and *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 55, (1973).

A classification found to be arbitrarily imposed, *McLaughlin* v. *Florida,* 379 U.S. 184, 190 (1964), a means to restrict a federal right, *Gomillion* v. *Lightfoot,* 364 U.S. 339, 347 (1960) or performing an unlawful end, *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886), *Gomillion* v. *Lightfoot,* 364 U.S. at 347, will be deemed an Equal Protection violation.

The rational basis standard is considered currently in litigation involving state economic and social welfare legislation. It is the standard employed on laws restricting the availability of employment opportunities, *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). This allows states to indulge in experiments concerning economic or social policy.

The second and more recent Equal Protection test involves strict scrutiny of laws regulating suspect classifications and fundamental interests. Only a compelling state interest can survive a strict scrutiny examination by the Court.

Fundamental interests include voting,[1] marriage,[2] interstate travel,[3] procreation[4] and criminal appeals.[5]

[1] *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966).

[2] *Loving* v. *Virginia,* 388 U.S. 1 (1967).

[3] *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

[4] *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

[5] *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

Current suspect classifications include race, nationality and alienage.[6]

A. Alleged Gender Based Discrimination Is Not a Suspect Classification.

If it could be shown that gender was a suspect classification or that government employment was a fundamental right, upholding a preference law like Mass. Gen. Laws, Ch. 31, § 23, (the Act in dispute in this case) might be very difficult.

A plurality of the Supreme Court found sex to be a suspect classification in *Frontiero* v. *Richardson,* 411 U.S. 677, 689 (1973). However, a majority of the Court has never endorsed this.[7]

A statutory classification between men and women is subject to strict scrutiny, *Craig* v. *Boren,* 429 U.S. 190, 197 (1976) but the fact that the Massachusetts law does not classify by sex (both veterans and non-veterans can be of either gender) would make this rule inapplicable.

The court in *Koelfgen* v. *Jackson,* 355 F. Supp. 243, 250 (D. Minn. 1972), *aff'd mem.,* 410 U.S. 976 (1973), found no fundamental right under the constitution to government employment. This was emphasized in *Massachusetts Board of Retirement* v. *Murgua,* 427 U.S. 307, 313 (1976). A strict scrutiny standard will not be employed concerning state legislation involving the availability of employment per se, 427 U.S. at 313.

[6] *Graham* v. *Richardson,* 403 U.S. 365 (1971).

[7] *Regents of University of California* v. *Bakke,* —— U.S. ——, 98 S.Ct. 2733, 2755 (1978).

A number of courts, finding no strict scrutiny issue involving a Veterans' Preference Act, have upheld them by using the rational basis approach.

Koelfgen, involved a class action challenging the constitutionality of a Minnesota preference law much like the one in use in Massachusetts. Three different rationales were stated to justify this act, 355 F. Supp. at 251.[8]

An attack on the ten point bonus Pennsylvania Preference Statute by a female plaintiff was rebuffed through the use of the rational basis equal protection test, *Feinerman* v. *Jones,* 356 F. Supp. 252, 258-259 (M.D. Pa. 1973).

Branch v. *DuBois,* 418 F. Supp. 1128 (N.D. Ill. 1976), concerned an Illinois act which allowed many veterans preference points on police promotion tests. Plaintiff claimed sex discrimination as the effect of the examination resulted in no females ever having been promoted to sergeant, i.e. a disproportionate impact. Rational bases were detected which preserved the act, 418 F. Supp. at 1130.

Recently, a New Jersey court upheld the state's preference act against constitutional challenge by means of rational basis, *Ballou* v. *State Department of Civil Service,* 148 N.J. Super 112, 372 A.2d. 333, 338-339 (App. Div. 1977), *aff'd,* 75 N.J. 365, 382 A.2d 1118 (1978).

In the 1970's the Supreme Court has decided several cases involving sex discrimination with an intermediate equal protection standard, although it has never been officially adopted. Gerald Gunther aptly calls this "newer equal protection with a bite." This standard mandates a government "to show a fair and substantial relationship between a challenged legislative classification and the objectives that the legislation was designed to achieve."[9]

[8] See pp. 13-14 of this amicus brief.

The first case to employ this test was *Reed* v. *Reed,* 404 U.S. 71 (1971). It was followed by several decisions, including: *Kahn* v. *Shevin,* 416 U.S. 351 (1974), *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975), *Weinberger* v. *Wisenfeld,* 420 U.S. 636 (1975), and *Stanton* v. *Stanton,* 421 U.S. 7 (1975). It appears that the District Court applied this standard in *Anthony* v. *Massachusetts,* 415 F. Supp. 485 (D. Mass. 1976) and *Feeney* v. *Massachusetts,* 451 F. Supp. 143 (D. Mass. 1978).

The effect of the new test is that a law which is discriminatory towards women and "is based on sex role stereotypes" will be struck down "unless the legislative classifications are remedial, compensating for the present effects of past or present discrimination."[10]

A restriction was made to this rule in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). Facially neutral statutes would be immune unless they are "mere pretexts" for sex discrimination.

Amicus suggests that the decisions in *Anthony* and *Feeney* should have been decided on the traditional

[9] Note, *Veterans' Preference in Public Employment,* 44 Geo. Wash. L. Rev. 623, 635 (1976).

[10] Note, *Veterans' Preference Statute which precludes women from Civil Service positions violates Equal Protection,* 23 Wayne L. Rev. 1435, 1440-1441 (1977).

rational basis standard as both were challenges to the Massachusetts Veterans' Preference Act.

Moreover, even if the stricter intermediate standard is the touchstone for decision, the *Anthony-Feeney* rulings should be rejected by the court.

The Massachusetts Act is facially neutral towards sex; both sexes, if veterans, are equally benefited. The act also lacks discriminatory intent, as the court itself admits in *Anthony,* 415 F. Supp. at 495, and *Feeney,* 415 F. Supp. at 145-146.

Therefore, the *Geduldig* restriction should be controlling and the Preference Act pass constitutional muster.

B. Invalidation of a State Veterans' Preference Statute on Equal Protection Grounds Requires a Discriminatory Intent, Not Discriminatory Impact.

The court in *Anthony* found that the Massachusetts Veterans' Preference Act has a "dramatic" negative impact on female hiring patterns. Although the law does not have a discriminatory or irrational end, the means selected by the Commonwealth (absolute Veterans' Preference) acts to prevent qualified women from obtaining civil service employment. The act benefits males due to years of extremely restricted female participation in the armed forces, 415 F. Supp. at 495, 497. Although required on remand to reconsider its decision in light of *Washington* v. *Davis,* 426 U.S. 229 (1976), the court reaffirmed its opinion in *Feeney.*

Amicus notes that the decision of *Davis* and its progeny leads to the conclusion that the standards involving discriminatory intent formulated by the District Court are erroneous.

Davis concerned a constitutional challenge to a literacy test used for employment purposes by the District of Columbia police department. Racial discrimination was alleged due to a negative impact on the hiring of blacks due to the test.

The Supreme Court in *Davis* held that to employ the strict scrutiny equal protection standard, a showing of discriminatory intent is required, 426 U.S. at 240.

In his opinion, Justice White opined:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another . . . . Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the constitution. Standing alone, it does not trigger the rule . . . .
>
> 426 U.S. at 242.

Also pertinent to the *Anthony-Feeney* impact standard is this warning from the *Davis* opinion:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that

> may be more burdensome to the poor and to the average black than to the more affluent white.
>
> 426 U.S. at 248.

Senior District Judge Murray, who dissented in both *Anthony* and *Feeney,* stressed that *Davis* cannot be distinguished from *Feeney* in that the laws in both cases are facially neutral. Although the Massachusetts law had the heavier impact of the two, impact alone would not invalidate the legislation, 451 F. Supp. at 153.

In *Branch* v. *DuBois,* the court, in finding rational bases for a preference act, declared that the *Davis* holding was applicable to sex discrimination cases, 418 F. Supp. at 1132, 1133.

The Supreme Court, in *Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U.S. 252, 265 (1977) reaffirmed the *Davis* requirement of discriminatory intent. The Court continued:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstances and direct evidence of intent as may be available. The impact of the official action whether it—"bears more heavily on one race than another" . . .—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.
>
> 429 U.S. at 266 [Footnotes omitted].

Three cases since *Davis* have all upheld Veterans' Preference Statutes against equal protection attack.

Legislative intent to discriminate against women or other groups was not found.[11]

Amicus feel that there is insufficient evidence to demonstrate discriminatory intent by the Commonwealth of Massachusetts. Nor has it been convincingly demonstrated that the Preference Act, while facially neutral, has deliberately fostered sexual discrimination in job hiring.

Veterans' Preference laws aids veterans of both genders. Likewise, incidential negative aspects affect non-veteran men and women alike. Certainly, these laws may seem unfair to non-veterans, but that per se does not make them unconstitutional.

If it is felt that these laws should be changed, then the concept of federalism would dictate a remedy through state legislatures, not the federal courts.

States should be able to engage in social and economic experimentation without hindrance from "super-legislatures" except when fundamental rights or suspect classifications are involved—which is not the case with *Feeney.*

Legislatures have balanced divers interests when they have enacted laws concerning civil service hiring. They have expressed important reasoning for the preferential treatment of veterans. Such judgments should not be disturbed except for the most profound reasons.

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[11] *Bannerman* v. *Department of Youth Authority,* 436 F. Supp. 1273 (N.D. Cal. 1977), *Branch* v. *DuBois, Ballou* v. *State Department of Civil Service.*

II. VETERANS' PREFERENCE ACTS HAVE A RATIONAL BASIS AND ARE CONSTITUTIONAL.

In the above section it has been demonstrated that the proper Equal Protection standard for alleged gender discrimination in Veterans' Preference statutes involves a rational basis.

Statutes having a non-discriminatory intent and a rational basis should be constitutionally upheld. Amicus suggests that the Preference Acts of Massachusetts and other states have valid rational purposes behind them.

A. The Purposes of Veterans' Preference Acts Are Remedial and Recognitional.

Veterans Preference Acts are but a small portion of legislative enactments conferring benefits. The notion of Veterans' Benefits is an ancient and nearly universal practice.

Land grants and pensions were employed by ancient Egypt, Babylonia, Greece, Rome, and the Aztecs in Mexico.[1] Pensions and homes for pensioners were developed in England and France.

In America, Veterans benefits have been provided since Plymouth Colony's Statute of 1636. The Continental Congress offered soldiers pensions during the Revolution. The Federal Government has concerned itself with veterans affairs since its inception.[2]

Currently, Federal Veterans' benefits include disability payments, hospital care, unemployment insurance, reemployment rights, survivors' compensation, pensions, employment preference, housing and education ("GI Bill") subsidies.

States have developed Veterans' benefits programs as well. These include bonuses, burial benefits, lower standards for professional and occupational qualifications, license fee and real property tax exemption, state homes and hospitals and local and state government preference in hiring, promotion and reemployment.

Every state has some form of veterans' preference in hiring except Mississippi. There are a number of types of such hiring statutes. A generally discredited form involved absolute preference for Veterans without any level of qualifications. A form used in several states including Massachusetts requires Veterans who achieve a particular grade on an examination will obtain absolute preference regardless of the scores of non-veterans. Most states employ a point-bonus system whereby five or more points are compiled with the grade of a qualifying veteran. Disabled veterans are often given an extra five points.[3]

Several reasons have been articulated for creative Veterans' Preference Statutes.

The District Court in *Koelfgen* v. *Jackson,* 355 F. Supp. at 251 mentioned three rationales:

1. The State owes a debt of gratitude to those veterans who served the nation in time of peril. State ex rel. Kangas v. McDonald, 188 Minn. 157, 246 N.W. 900 (1933).

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[1] T. Mosch, *The G.I. Bill* 107 (1975).

[2] S. Levitan & K. Cleary, *Old Wars Remain Unfinished* 7-8 (1973).

[3] Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause,* 26 Buffalo L.Rev. 3, 7-8 (1976-77).

2. A veteran is likely to possess courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office holder. Goodrich v. Mitchell, 68 Kan. 765, 75 75 P.1034 (1904)

3. Veterans should be aided in rehabilitation and relocation because military service has disrupted their normal life and employment. Note, 26 Wash. & Lee L.Rev. 165 (1966).[4]

Another important motive appears to be a patriotic one. Providing employment preferences may encourage acts of military bravery in combat or enlistment into the armed forces.[5]

Legislatures often employ several of the above reasons when enacting veterans legislation. The Pennsylvania Veterans' Preference Act was based on the first two considerations mentioned in *Koelfgen, Feinerman* v. *Jones,* 356 F. Supp. at 259. The Commonwealth of Massachusetts has argued that:

> Historical analysis makes it clear that the enactment of this legislation by the General Court was in no way motivated by a desire to discriminate against women. Rather, the legislative motivations for Massachusetts Veterans' Preference statutes were: (1) to reward those who have sacrificed in the service of their country; (2) to assist Veterans in their readjustment to civilian life; and (3) to encourage patriotic service.
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> *Feeney* v. *Massachusetts,* 451 F. Supp. at 149.

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[4] See also *Mitchell* v. *Cohen,* 333 U.S. 411, 418 (1948), *Johnson* v. *Robison,* 415 U.S. 361, 377 (1974).

[5] *Opinion of the Justices,* 166 Mass. 589, 595, 44 N.E. 625, 627 (1896), *Hutcheson* v. *Director of Civil Service,* 361 Mass. 480, 281 N.E.2d 53, 57 (1972).

The common decision by states and the Federal Government (the Veterans' Preference Act of 1944)[6] to use Veterans' Preference Acts demonstrates a strong desire to remedy many of the problems our veterans face as well as a recognition of the veterans' worth to society. This recognition is shown to veterans through legislative benefits. Every American is reminded of how much we owe our veterans by means of the proclamation, each November, of a Federal holiday called "Veterans' Day."

Amicus stresses that any of the above-mentioned rationales is adequate constitutionally. Patriotism concerns love of one's country and a determination to assist those who have fought and sacrificed for it. The skills and maturity obtained through military service should not be wasted. Nor should Americans forget the heavy economic physical and psychological costs entailed through being in the armed forces. Our veterans do not ask for favoritism but for an equal opportunity. Veterans Preference is a time-hallowed way to counteract various advantages enjoyed by non-veterans.

B. Veterans Deserve Preferential Status in State Civil Service Employment.

In the over two hundred years of this nation's existence, about 39,000,000 women and men have served in the American military. Of this number, over one million perished in the various wars America has fought to preserve its freedom.[7]

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[6] Act of June 27, 1944, ch. 287, 58 Stat. 387, 5 U.S.C. §§ 2108, 3309-12, 3316.

[7] *Annual Report 1977,* Administrator of Veterans Affairs, Veterans Administration 1.

There are currently 29,844,000 living veterans of whom over 26,000,000 served during war time.[8]

While the veteran population expands, its composition changes. The number of black and other minority personnel has expanded rapidly in recent years. Women are increasing both their representation and responsibilities. Although their actual numbers are still low in comparison with the male total, women are now performing many previously all-male functions, such as serving aboard non-combat vessels. In short, one can no longer characterize the armed forces as a white, male preserve. Legislation aiding veterans therefore, has an impact of aiding minorities and women. Veterans preference may be in time, just another form of affirmative action.

The composition of our veteran population concerns more than race or gender. It involves an increasing number of senior citizens: 2,374,000 in 1977.[9] Additionally, large numbers of veterans have been wounded or disabled in various degrees fighting for this country.

Veteran preference laws aid, not only ex-servicemen and women, but also their families. In fact, the number of people directly related to veterans benefits totals nearly 96,000,000 (or 44.1% of the American population).[10]

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[8] *Id.* at 1. Figures are as of September 30, 1977.

[9] *Id.* at 3.

[10] *Id.* at 3. This number breaks down as follows: 27,900,000 children under 18 years old; 11,300,000 other family members and children 18 and older; 22,800,000 spouses and 3,800,000 survivors of deceased veterans. Figures are as of September 30, 1977.

Numbers alone, however, do not express all the reasons behind the standard state practice of granting preferential treatment in civil service employment to veterans. Years of experience have demonstrated that extra efforts are needed to reorient the returning servicemen or women to the challenging environment of civilian life.

Veterans, after years of adjustment to military life, encounter after their discharge, special problems economically, socially and psychologically.

A serious and long standing problem is unemployment. The nature of modern warfare requires the mobilization of large amounts of civilians to serve in a nation's armed forces. This naturally leads to a large scale and often rapid demobilization upon the conclusion of hostilities. While the size of the armed forces shrink, domestic economies face declines in war-related employment and dislocations due to retooling industries for pressing civilian needs. Massive "dumping" of veterans on an already tight labor market can create severe unemployment with resulting political unrest. The history of the United States is no exception to this generalization.

America's first experience with large mobilizations occurred during the Civil War. Nearly two million Union veterans survived.

There were 4,700,000 veterans from World War One.[11] Those that were discharged ran into an economic slump in early 1919 and a full depression from 1920-21.[12] The onslaught of another depression in 1929

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[11] S. Levitan & K. Cleary, supra note 2, at 9.

[12] T. Patten, Jr., *Public Policy Towards the Employment, Retirement and Rehabilitation of the "Old Soldier,"* 358 (June 1959).

also hit World War One veterans hard. Veteran discontent with high unemployment led to the unsuccessful Bonus March on Washington in 1932. Although some government attempts were made to obtain veteran employment (ten per cent of the members of the Civilian Conservation Corps were veterans), unemployment remained high until the outbreak of the Second World War.[13]

During the war, various estimates were projected demonstrating that the end of the war and demobilization would create millions of unemployed veterans.[14] Fortunately, the American economy did not lapse into post-war depression. However, veteran unemployment continued above that of the general population. For example, 20 to 44 year-old veterans faced an unemployment rate of 14.9% in December 1945 and 8.8% two years later.[15]

Similarly, unemployment was higher among veterans of the Korean conflict than the general public. Their plight was not helped by a post-war recession.[16]

The Vietnam War veteran has encountered even more problems than his counterparts of the past. Those returning GI's found themselves heroes and awarded general recognition and esteem. The Vietnam veterans are different. They have not returned en masse but in rotated groups. They came home to a country with divided feelings as to the worthiness of the war. These

[13] *Id.* at 344-346.

[14] *Id.* at 358.

[15] J. Helmer, ***Bringing the War Home*** 210 (1974).

[16] P. Starr, ***The Discarded Army*** 203 (1973). In November 1954, 7.9% of returning veterans were unemployed.

veterans lacked the social prestige of their predecessors. The unpopularity of the War rubbed off on those who fought it. As a consequence, employers no longer sought them as eagerly as in the past.

The Vietnam veteran faced additional problems. Veterans had higher rates of mental illness, and drug addiction than the general population.[17] Veterans were generally younger and less prone to have established skills than previous veterans. They were better educated and so less likely to seek menial jobs. Hence, competition for skilled jobs was high. More of them were minorities and women who were more vulnerable to discrimination.

Discrimination towards Vietnam Era Veterans has been widespread.[18] This has adversely affected job prospects. In fact:

> The unpopularity of the war places an additional burden upon the returning veteran. The young veteran finds himself referred to in print and in conversation as a dope addict or trained killer. Often his own peer group tells him what a fool he was to go to Vietnam in the first place. In his absence they have moved ahead in their life pursuits . . . "while the veteran . . . must start from the beginning as though his military service made no difference.[19]

Unemployment rates for Vietnam veterans have fluctuated along with the American economy of the

[17] J. Helmer, supra note 15, at 62-63. A large number of studies on economic and psychological difficulties may be found in Staff of Senate Comm. on Veterans' Affairs, 93rd Cong., 2d Sess., ***Source Material on the Vietnam Era Veteran*** (Comm. Print 1974).

[18] J. Helmer, supra note 15, at 229.

[19] S. Levitan & K. Cleary, supra note 2, at 106.

1960's and 1970's. Yet, unemployment figures for veterans were, until recently, consistently above that of non-veterans.[20] The situation is still alarming for black and young veterans,[21] as is the fact that vocational training in the armed forces has not aided in obtaining employment.[22]

Amicus finds that the traditional bases for veterans preference acts should be supplemented by the needs of veterans for assistance in overcoming their current disadvantaged position in the American economy.

Preference for veterans in hiring allows for some mitigation in the often bleak employment outlook for the discharged service man and woman. Political attitudes towards our past involvement in Indochina have unfairly tarnished the once proud image of the veteran. Remedial action by states and the Federal Government can have the salutory effect of restoring the veteran's social prestige through gainful employment. Our collective responsibility towards the veteran should not end with discharge.

Amicus suggests that an analogy to a protected status for veterans may be found in judicial action upholding employment preference for Indians. The Supreme Court in *Morton* v. *Mancari,* 417 U.S. 535 (1974) denied a class action by non-Indian employees of the Bureau of Indian Affairs challenging Indian employment preference allowed by the Indian Reorganization Act.

[20] J. Helmer, supra note 15, at 102.

[21] The unemployment rate of 20-24 year old veterans in September 1977 was 20.1%. The rate for non-veterans was a "mere" 9.1%.

[22] J. Helmer, supra note 15, at 222.

The Court found that the Equal Employment Opportunities Act of 1972 had not repealed the Indian preference (nor has it repealed veterans preference).

In addition, Indian preference is not racially discriminatory and has a rational basis. Preference was "reasonably and directly related to a legitimate, non-racially based goal," 417 U.S. At 554.

Veterans preference laws are also designed with a non-racial (or sexual) aim in mind. Both laws may benefit those of a particular race the most, but this is only an indirect effect. Government has responsibilities for both veterans and Indians. The two groups have long received "particular and special treatment" from Congress. A preferential status is therefore one means of fulfilling legitimate legislative obligations.

CONCLUSION

Equal Protection challenges of sex discrimination against Veterans Preference Acts should be judged on a rational basis standard. This is a result of sex not being a suspect classification requiring strict judicial scrutiny.

As Veterans Preference Acts lack discriminatory intent and have several rational bases to support them, they are constitutional. Such bases include a natural desire to reward veterans for their sacrifices for America and to assist veterans by compensating for economic and physical losses sustained through military service. This Court must protect veterans' rights

by upholding the constitutionality of the Massachusetts Veterans Preference Act.

Respectfully submitted,

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